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IN THE

SUPREME COURT OF THE UNITED STATES.

(1)

OCTOBER TERM, 1944.

No. 1326 96

LOUIS STOCKSTROM,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT.

THOMAS R. REYBURN,
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Cases Cited.

Statutes Cited.

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to the United States Circuit Court of Appeals for the Eighth Circuit.

The petitioner, Louis Stockstrom, prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the Tax Court of the United States.

SUMMARY STATEMENT.

The ultimate question is whether the control exercised by petitioner as sole trustee of the property in ten irrevocable trusts created by him for his children and grandchildren, is equivalent to ownership of the trust property

for the purpose of taxing the income to him under Sec. 22 (a) of the Internal Revenue Code (26 U. S. C. A., Section 22 (a)).

Petitioner is a successful business man of St. Louis, Missouri (R. 20-23). He has three children and seven grandchildren. The youngest child is forty-nine years of age. Each child is married and maintains a home apart from petitioner. The grandchildren live apart from petitioner with their respective parents (R. 20).

On January 6, 1936, petitioner executed four declarations of trust which are in all material respects the same. Three of the declarations created separate trust estates for his three children; the fourth created a separate trust estate for each of his seven grandchildren (R. 20). "Item One" of each declaration gave petitioner, as trustee, broad administrative powers over corpus of the trust (R. 23, 26, 37-40, 51-53, 64-65).

The trusts for the children are to continue absolutely during their lives and the lives of their children. Income of each child's trust is distributable to the child and his children "in such proportions as will provide each such beneficiary with funds sufficient to enable him or her to live in a manner befitting his or her accustomed standard of living." Upon termination of the life estates, corpus is distributable to testamentary appointees or lineal descendants of the last life tenants (R. 26-40, 53-67, 68-69, 70-71, 72-73).

The trusts for the grandchildren are to continue during their lives. Income of each trust may be distributed to the grandchild or accumulated. Upon termination of the life estates for the grandchildren, corpus of the trusts goes to their testamentary appointees or lineal descendants (R. 67-73).

The trusts were irrevocable, and petitioner can never receive corpus or income from any of them (R. 34, 47, 60, 79).

The Tax Court held that petitioner had "extraordinarily broad administrative powers" over corpus of each trust and "substantial" control of the income; that the combined control of corpus and income made the doctrine of **Helvering v. Clifford,** 309 U. S. 331, applicable and the income of the trusts taxable to petitioner (R. 87-95).

The Court of Appeals, affirming the decision of the Tax Court, said that it was not able to say that the Tax Court had erred in holding that petitioner's combined control of the trust property and its income was equivalent to its economic ownership for purposes of Section 22 (a) (R. 106-119).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 23, 1945 (R. 120). Petition for rehearing timely filed by petitioner (R. 121) was denied on April 18, 1945 (R. 137). The jurisdiction of this Court is invoked under Section 240, as amended February 15, 1925, of the Judicial Code (28 U. S. C. A., Section 347 (a).

STATUTE AND REGULATIONS INVOLVED

Section 22 (a) of the Internal Revenue Code and Treasury Regulations 103, promulgated under the Internal Revenue Code are set out in the appendix.

QUESTIONS PRESENTED.

1. Is the petitioner taxable on the income of the trusts because, as trustee, he has broad administrative powers over corpora and power,—(a) in the children's trusts, to distribute the income to the child or the child's children in accordance with a standard, and (b) in the grandchildren's trusts, to distribute or accumulate the income?

2. Is petitioner the owner of the trust property for the purpose of taxation under Section 22 (a) of the Internal Revenue Code?

3. Can petitioner realize economic gain from the control vested in him as trustee over corpora and income of the trusts?

4. Are the satisfactions derivable by petitioner from the control vested in him as trustee over corpora and income of the trusts, the equivalent of economic gain or benefit?

5. Is the doctrine of **Helvering v. Clifford,** 309 U. S. 331, applicable to a long-term trust from which the grantor-trustee can never receive corpus or income, merely because he has broad administrative powers over corpus and limited control over distribution of the income?

REASONS RELIED ON FOR GRANTING THE WRIT.

The decision conflicts with the decisions of the Circuit Court of Appeals for the Seventh Circuit in the cases of **Commissioner v. Katz,** 139 Fed. (2d) 107, and **Commissioner v. Armour,** 125 Fed. (2d) 467, and conflicts with the decision of the Circuit Court of Appeals for the Second Circuit in the case of **Phipps v. Commissioner,** 137 Fed. (2d) 141.

The decision conflicts with the decisions of this Court in **Helvering v. Stuart,** 317 U. S. 154; **Eisner v. Macomber,** 252 U. S. 189; **Hoeper v. Tax Commission,** 284 U. S. 206, and **Heiner v. Donan,** 285 U. S. 312.

The ruling by the Court of Appeals that a grantor-trustee of a trust is the economic owner of the trust property for the purpose of taxation because he has broad administrative powers over the corpus and has control

over the income, is a decision on an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION.

It is respectfully submitted that this petition for writ of certiorari should be granted.

THOMAS R. REYBURN,
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CHASE MORSEY,
RICHARD A. AUSTIN,
Of Counsel.

IN THE

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the Tax Court (R. 87-95) is reported in 3 T. C. 255. The opinion of the Circuit Court of Appeals, including the concurring opinion of Judge Sanborn (R. 106-119), is not yet reported.

JURISDICTION.

The jurisdictional statement appears in the Petition for the Writ of Certiorari.

STATEMENT OF THE CASE.

Petitioner's statement of the case appears in the Petition for the Writ of Certiorari.

ARGUMENT.

I.

Conflict in the Opinions of the Circuit Courts of Appeals.

Commissioner of Internal Revenue v. Katz, 139 Fed. (2d) 102, is a decision by the Seventh Circuit refusing to tax trust income to the grantor-trustee. Katz was a successful businessman with income in excess of needs; his salary in 1937 was $48,000 and in 1938 more than $65,000. He executed four separate declarations of trust, one each for the benefit of his wife and their three children. The trust instruments gave him very broad administrative powers and as to income provided:

> "The trustee may, in his discretion, at any time and from time to time, withhold and accumulate any of the net income payable to any of the foregoing beneficiaries and/or apply any or all of such income for the benefit of such beneficiaries."

The Court of Appeals denied the Commissioner's contention that the case was within the **Clifford** doctrine saying:

> "We agree with the Board that the instant case is distinguishable from the Clifford case. True, there are some elements in common, most noticeable of which are the broad powers of management vested in the trustee. Such matters of similarity, however, are of little consequence and certainly not controlling when considered in connection with other provisions, which, in our judgment, clearly remove the instant situation from the rationale of the Clifford case. The trust in Clifford was of short duration, while in the instant case it is long term in character, having an indefinite and at all times unascertainable duration. Of course, the trust duration is not conclusive, but it is a significant circumstance. Retention by the grantor of economic benefit is more readily attributable in a trust

of short term duration. Under the circumstances of the Clifford case, conspicuous among which was a short term trust, the court concluded that there was 'but a temporary reallocation of income.' On the other hand, in the instant case both the income and corpus, due largely to the long term nature and indefinite existence of the trust, amount to a final disposal which may be characterized as permanent. In Clifford, the trust property was to be returned to the donor in a comparatively short period, while here it will never be returned, except on the contingency of revocation, hereinafter discussed in connection with Sec. 166."

In this case and the **Katz** case there was—(a) income in excess of needs, (b) a grantor-trustee, (c) a long term trust and permanent disposition of the property, (d) an intimate family relation, (e) broad administrative powers, and (f) power to distribute or accumulate income.

In **Commissioner v. Armour**, 125 Fed. (2d) 467, the Seventh Circuit Court of Appeals held that the grantor-trustee of a trust for her daughter was not liable for the tax on the trust income. There was the same factual similarity to this case as appears in the **Katz** case.

The case of **Phipps v. Commissioner**, 137 Fed. (2d) 141, is based on facts almost the same as the facts in the case of the children's trusts. The petitioner created a trust for his wife and child naming himself, a corporation, and his wife as trustees. After the child became twenty-one years old, the trustees were given the power, in their absolute discretion, to allocate income of the trust between petitioner's wife and child. The Tax Court held that as the petitioner dominated the corporate trustee, he could control distribution of the income, and, therefore, the doctrine of **Helvering v. Clifford**, 309 U. S. 331, was applicable. The decision of the Court of Appeals reversing the Tax Court is particularly important as the Court of Appeals

found that petitioner did control the corporate trustee and consequently had the same control as if he had been sole trustee. The Court said (l. c. 143):

> "Nevertheless, we cannot agree with The Tax Court that this case is like Commissioner v. Buck, 2 Cir., 120 F. 2d 775, or otherwise within the Clifford doctrine. The trust here is a long term trust, and, as we said in the Buck case, the control over the income exercised by the grantor must be 'very substantial' in such circumstances if the income is to be considered his. It may be argued that during the minority of the child, the taxpayer (operating through the trust company) could refuse to agree to the payment of any income to the wife, and that, if she, in turn, thereupon refused to agree to the payment of any income for the support and maintenance of the child, the income would accumulate and be paid to the child at the age of 21, with only a contingent possibility of the wife's receiving these accumulations (i. e., in the event that the child predeceased the wife before the child reached the age of 21). But, as the obvious purpose of the trust was that the wife was to receive a considerable part of the income, an arbitrary refusal on the part of her co-trustee to pay her any of the income so that it would accumulate, would, we think, induce the New York courts to interfere and compel the co-trustee to exercise a genuine discretion in the light of the purpose of the trust."

An arbitrary refusal by petitioner to distribute income of the trust for his children to a beneficiary in need of funds to maintain his or her accustomed standard of living, would undoubtedly induce the Missouri courts to interfere and compel petitioner to exercise a genuine discretion in allocating the income of the trusts among the beneficiaries. **Williams v. Hund**, 302 Mo. 451, 258 S. W. 703; **Plummer v. Brown,** 287 S. W. 316; **Mississippi Valley Trust Co. v. Buder,** 47 Fed. (2d) 507.

The similarity of the facts in the cases decided in favor of the taxpayer by the Second and Seventh Circuit Courts of Appeals with the facts in this case show a conflict in the decisions which ought to be resolved by this Court.

II.

Conflict With Decisions of This Court.

The decision also conflicts with the decision by this Court in **Helvering v. Stuart,** 317 U. S. 154, 602, 63 Sup. Ct. 140. The facts in the **John Stuart** case and in this case cannot be readily distinguished; the instruments and the circumstances were very much the same. The trusts created by John Stuart for his adult children provide that income of the trusts should for fifteen years be paid to the beneficiaries or accumulated as the trustees in the exercise of their absolute discretion might determine. After fifteen years the entire net income was to be paid to the beneficiaries for the balance of their lifetime. The distribution clauses in the **John Stuart** case and in this case are so similar that there does not appear to be any real difference between them in so far as control of income is concerned. The only other difference is that petitioner is sole trustee, while John Stuart was one of three trustees, the others being his wife and brother. When the fact is considered that the co-trustees in each **Stuart** case were the wife and brother of the grantor-petitioner and that the trustees of the two trusts interlocked, there is no real difference in this respect. This Court in response to the contention that Stuart's control over the trusts made him taxable under Section 22 (a), said:

> "In the John Stuart trusts the trustees, in their discretion, were to distribute income to the named beneficiaries for fifteen years and thereafter to distribute the entire net income. In the Douglas Stuart trusts, the directions authorized discretionary distribution to

the beneficiaries or its application to their education, support and maintenance until the children reached the age of twenty-five years. Undistributed portions of the income were to be added to the corpus. Plainly, these distributions or accumulations were to be used for the economic advantage of the children of the settlors and to the amount of these distributions and accumulations would satisfy the normal desire of a parent to make gifts to his children. Is this alone sufficient to make the income of the trusts taxable to the settlors?

"Disregarding for the moment the minority of some of the beneficiaries, we think not. So broad a basis would tax to a father the income of a simple trust with a disinterested trustee for the benefit of his adult child. No act of Congress manifests such an intention. Economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme. That gain need not be collected by the taxpayer. He may give away the right to receive it, as was done in **Helvering v. Horst,** 311 U. S. 112, 61 S. Ct. 144, 85 L. Ed. 75, 131 A. L. R. 655; **Helvering v. Eubank,** 311 U. S. 122, 125, 61 S. Ct. 149, 150, 85 L. Ed. 81, and **Harrison v. Schaffner,** 312 U. S. 579, 61 S. Ct. 759, 85 L. Ed. 1055. But the donor nevertheless had the 'use (realization) of his economic gain.' 311 U. S., at page 117, 61 S. Ct., at page 147, 85 L. Ed. 75, 131 A. L. R. 655. In none of the cases had the taxpayer really disposed of the res which produced the income. In **Corliss v. Bowers,** 281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916, he had disposed of the res, but with a power to revoke at any moment. This right to realize income by revocation at the settlor's option overcame the technical disposition. The 'nonmaterial satisfaction' (gifts-contributions) of a donor are not taxable as income. **Helvering v. Horst,** supra."

The pleasures and satisfactions derivable by petitioner from his control of the trusts were nonmaterial satisfactions which are not the equivalent of economic benefit or

gain. The decision conflicts with **Helvering v. Stuart** and this Court should resolve the conflict.

The decision in this case is that the pleasures and satisfactions derived by petitioner from control of the trust property constitutes **income** within the meaning of the Sixteenth Amendment to the Constitution of the United States. The ruling cannot be reconciled with the decision of this Court in **Eisner v. Macomber**, 252 U. S. 189, 40 Sup. Ct. R. 189, where income was defined as follows:

> "* * * a gain, a profit, something of exchangeable value, **proceeding from** the property, **severed from** the capital, however invested or employed, and **coming in,** being **'derived'**—that is **received** or **drawn by** the recipient (the taxpayer) for his **separate** use, benefit and disposal—**that** is income derived from property. Nothing else answers the description."

Neither the Tax Court nor the Court of Appeals attempted to say that petitioner could make personal use of either income or principal of these trusts. The decision seems to be in direct conflict with **Eisner v. Macomber,** which holds that **income** within the meaning of the Sixteenth Amendment of the United States means something coming in for personal use. To tax petitioner upon the control he exercises over corpus and income of these trusts is a tax upon his right to act as trustee of the trusts and imposes a tax upon the right to act as trustee without apportionment among the several states and without regard to any census or enumeration, and violates Article I, Section 2, Clause 3, of the Constitution, which provides that direct taxes shall be apportioned among the several states according to their respective numbers.

The Circuit Court of Appeals found as a fact that:

> "All ten of the trusts were irrevocable and petitioner was not to receive corpus or income from any

of them. * * * The trusts were intended for petitioner's family and he was not to share in the income or get back any part of the corpus.''

Under the laws of Missouri and also under the above finding by the Court of Appeals, if petitioner is forced to pay a tax in this case he could not recoup any part thereof from the trust estate. The trust corpus and income were fully, finally and definitely disposed of. The money to pay the tax must, therefore, come from petitioner's private property. This is in effect the levying of a tax on capital and has nothing whatever to do with income.

Moreover, if petitioner should meet with financial reverses and be forced into bankruptcy, where would the Government collect its tax on the trust income? Certainly Congress did not intend that trust income should escape taxation when the grantor of the trust had become insolvent. If the trust corpus could revert to the grantor as in the Clifford case, we would have an answer to our problem, but where the property is definitely disposed of, it must of necessity bear its burden of taxation, and that burden cannot be shifted to persons who might later in life become financially irresponsible.

After the Court of Appeals made the specific finding of fact referred to, it is clear that no tax could be constitutionally exacted from the petitioner in this case. The finding shows that the petitioner had permanently and definitively disposed of the corpora of the trusts and that he could not receive corpus or income from any of them. It is, therefore, plain that the income of the trusts would be taxable under Sections 161, 162 and 163 of the Internal Revenue Code, and not taxable to petitioner because it was not his income.

In the guise of an income tax, Congress would clearly have no right to tax as income of a taxpayer the income which the Court has definitely determined to be that of another taxpayer.

In the case of Hoeper v. Tax Commission, 284 U. S. 206, this Court said:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income."

In the case of Heiner v. Donan, 285 U. S. 312, this Court said:

> "Plainly, this is to measure the tax on A's property by imputing to it, in part, the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and in denial of due process of law. Such an exaction is not taxation but spoliation. It is not taxation that Government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the Government from his own gains and his own property."

Later on in the opinion in the same case this Court said:

> "It is, therefore, a contribution to the Government exacted of one person, based pro tanto upon the wealth of another."

In the case at bar the proposed exaction of the tax from petitioner is based, not on the income from his property and not upon his income, but upon the income of ten irrevocable long-term trusts from which petitioner can never receive economic gain or benefit. The property was permanently disposed of. To shift the burden of the tax to the petitioner in this case would be so arbitrary and caparicious as to violate the Fifth Amendment to the Constitution of the United States by depriving petitioner of his property without due process of law.

III.

There Is an Important Question of Federal Law.

The ruling by the Court of Appeals that petitioner is economic owner of the trust property for tax purposes is a decision on an important question of federal law which has not been, but should be settled by this Court. It is a fact that many trust instruments such as these have been put into operation, and that the question of whether a grantor-trustee who can never receive corpus or income from a trust created by him, is one of great importance to the many individuals involved. A man of wealth who creates a trust and disposes of the bulk of his property for the benefit of his children may find himself a pauper as the result of the tax.

One criticism of the decision in this case is that it overrules the following Tax Court decisions:

> Ayer v. Com., 45 B. T. A. 146;
> Lowenstein v. Com., 3 T. C. 1133;
> Small v. Com., 3 T. C. 1142;
> Cherry v. Com., 3 T. C. 1141;
> Banfield v. Com., 4 T. C. 6.

The above decisions were reviewed by the entire sixteen members of the Tax Court. They cover a period of time from 1941 to September, 1944, and constitute the Tax Court's best judgment on the question of taxation of trust income. After the decisions were rendered they were reviewed by the Commissioner of Internal Revenue and were acquiesced in by him. This acquiescence on the part of the Commissioner means that the Tax Court and the Commissioner are in complete accord on the principles settled by those cases. That is what tax practitioners know as an "administrative policy." This policy has long been settled in the Treasury Department and the decision in this case completely ignores this fact.

The principles which were settled by the above Tax Court decisions are:

(a) A grantor may act as trustee.

(b) Powers vested in a grantor-trustee are not the same as powers reserved by the grantor in his individual capacity.

(c) Broad powers vested in a trustee, even though without adverse interest, indicate complete lack of control in the grantor.

(d) Adult children living separate and apart from the grantor are not members of the grantor's family.

(e) Economic gain—as distinguished from non-material satisfactions—is necessary to produce taxable income.

The question is one of great complexity. Judge Johnsen, writer of the opinion in this case, said:

> "It is to be wished, of course, that the field opened up by the Clifford case may come to have some definite monuments, but the doctrinal state in which the matter has been left by the Supreme Court permits, for the present, of only a case by case progression 'to determine precisely where the line shall be drawn between gifts of income producing property and gifts of income from property of which the donor remains the owner, for all substantial and practical purposes'" (R. 118).

Judge Sanborn, in a concurring opinion, expresses the perplexity of everyone called upon to deal with this phase of tax law when he said:

> "The Tax Court decided that the income of the trust created by Louis Stockstrom was his income for purposes of taxation, under the doctrine of Helvering v. Clifford, 309 U. S. 331, regardless of the fact that he could not recapture either trust income or trust principal. The basis for the decision is that Stockstrom, as donor-trustee, retained such broad powers of control and distribution over trust corpus and income

> that the income was taxable to him, although he could have none of it for his own use. I think the Tax Court might well have decided this case in favor of the taxpayer, but the standard for determining to whom the income was taxable is presently so vague and indefinite that I have no conviction as to whether the decision of the Tax Court is, as a matter of law, right or wrong. I therefore concur. I think it is unfortunate that courts which are required to determine such controversies as this must express opinions which are obviously little more than guesses. The number of cases in which the doctrine of Helvering v. Clifford, supra, is invoked indicates the difficulty which the Bench and Bar are having in applying that doctrine. See Shepard's United States Citations on 309 U. S. 331" (R. 119).

These frank statements of the judges are an appeal for clarification of these questions by this Court.

Helvering v. Clifford, 309 U. S. 331, is distinguishable from this case in every respect. There, the trust was for a short term of five years; here, the term is at least for the lives of the beneficiaries. There, the property reverted to petitioner in five years; here, no portion of corpora or income of the trust can ever revest in petitioner. There, petitioner reserved powers as an individual which, if exercised, would have destroyed the trust; here, petitioner's only powers are as trustee as limited by the laws of Missouri and the express provision of the trust instruments that he shall administer the trust property as he may deem best in the interests of the beneficiaries of the trust. There, the beneficiaries were petitioner's wife and children—his intimate family group; here, the beneficiaries are adult children and grandchildren with no legal claims on petitioner, and with separate residences apart from him. There, income of the trust was temporarily allocated to members of petitioner's immediate family; here, income of each trust is definitely and absolutely appropriated to a designated child or grandchild and his descendants There,

Clifford's control as an individual of the trust property during the trust and early reversion to him enabled him to realize economic gain from the trust property; here, the law forbids petitioner to realize any benefit from the trust property. There, one economic unit was divided into two; here, there is no division of an economic unit.

This Court should determine the question of whether the combination of broad administrative powers and control of income brings a trust within the doctrine of **Helvering v. Clifford.**

Furthermore, Article 166-1 of Treasury Regulations 86, were not promulgated under Section 22 (a) until two years after Clifford's tax liability accrued, and, therefore, were not considered by this Court in deciding Clifford's case. **Helvering v. Clifford,** 309 U. S. 331; Note p. 334. The regulations (set out in the Appendix) enumerate various types of trusts the income of which will be taxed under Section 22 (a), but do not purport to include long term trusts from which the grantor-trustee can never receive corpus or income. The doctrine of **Helvering v. Clifford,** as decided under Section 22 (a), should be reviewed by this Court under Section 22 (a) as affected by the regulations.

Conclusion.

The decision conflicts with decisions of the Circuit Courts of Appeals and of this Court, and presents questions of public importance which justify issuance of the writ.

Respectfully submitted,

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APPENDIX.

INTERNAL REVENUE CODE:

Sec. 22. **Gross income.**

(a) **General Definition.**—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * *

(26 U. S. C. 1940 ed., Sec. 22.)

TREASURY REGULATIONS 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)—1. **What included in gross income.**—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

* * * * * * *

Sec. 19.166-1 [as amended by T. D. 5194, 1942-2 Cum. Bull. 53, 62]. **Trusts with respect to the corpus of which the grantor is reguarded as remaining in substance the owner.**—(a) **Scope.—If the grantor of a** trust is regarded, within the meaning of the Internal

Revenue Code, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor, except as provided in section 22 (k) and section 171. This section deals with the taxation of such income. As used in this section, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) **Test of taxability to grantor.**—Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this section the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. A bare legal interest, such as that of a trustee, is never substatnial and never adverse. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless (except as provided in section 22 (k) or section 171) of—

(1) whether such power or ability to retake the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend, or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Internal Revenue Code, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitvely with the substanial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Internal Revenue Code has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: The fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus, the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or

management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John,

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since

the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

If, however, the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

(c) **Income and deductions.**—If the grantor is regarded as remaining in substance the owner of the corpus, except as provided in sections 22 (k), 23 (u), and 171, the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

INDEX

CITATIONS

In the Supreme Court of the United States

October Term, 1945

No. 96

Louis Stockstrom, petitioner

v.

Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 87–95) are reported at 3 T. C. 255. The opinion of the Circuit Court of Appeals (R. 106–119) is reported at 148 F. 2d 491.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1945. (R. 120.) A petition for rehearing was denied on April 18, 1945. (R. 137.) The petition for a writ of certiorari was filed on May 28, 1945. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in holding the grantor of several irrevocable long-term family trusts to be taxable, under Section 22 (a) of the Revenue Act of 1938 and the Internal Revenue Code, on the income therefrom where he had named himself as trustee and had retained broad powers of administration over the trust corpus and control over the distribution of trust income.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *
>
> (26 U. S. C., Sec. 22.)

The provisions of Section 22 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, are identical.

STATEMENT

The facts were found by the Tax Court as stipulated. (R. 19–87, 88.) They were summarized by the Tax Court as follows (R. 88–93):

Petitioner is the father of three adult children (one son and two daughters) and has seven grandchildren. On January 6, 1936, petitioner executed a separate declaration of trust for each of his three children, and a declaration of trust by which he created a separate trust for each of his seven grandchildren. Pursuant to the trust instrument, petitioner transferred to himself as trustee certain securities described in the various trust instruments as constituting the original corpora of the trusts, to which he later added other securities as provided for in such instruments. In all material respects the terms of the trust instruments were the same. (R. 88.)

The powers of the trustee are defined in the trust instruments as follows (R. 88–90):

> Item One: The Trustee is authorized to retain, during any part or all of the trust and without liability for loss in so doing, any property at any time received in trust hereunder; to sell, grant options on, lease for a period shorter or longer than the duration of this trust, exchange, transfer or convey any property held hereunder for such consideration and upon such terms as the Trustee may deem reasonable; and to invest and reinvest principal funds of the trust estate in such bonds, common or pre-

ferred stocks, notes secured by first mortgage or first deed of trust on improved real estate, debentures and other class or classes of property, either real or personal, and in such relative proportions as the Trustee may in his discretion determine and select, and in the exercise of such discretion the Trustee shall not be limited to investments of such nature as are now or may at that time be legally authorized for the investment of trust funds; to borrow money for the benefit of the trust estate and mortgage or pledge assets of the trust estate to secure the repayment thereof; to determine whether any money or other assets received hereunder shall be considered part of the principal of the trust estate or part of the income thereof or shall be apportioned between principal and income of the trust estate and the manner and extent of such apportionment; to determine except when otherwise herein elsewhere directed, whether any loss to, expenditure from or funds borrowed for the benefit of the trust estate should be charged to the principal or income of the trust estate or apportioned between principal and income of the trust estate, and the manner and extent of such apportionment; to compromise any claim of or against the trust estate; to vote in person or by proxy any or all of the shares of stock that may at any time belong to the trust estate at corporate meetings and for all corporate purposes; to consent to the reorganization,

consolidation or merger of any corporation and to exchange any of its securities held hereunder for securities issued in connection with such reorganization, consolidation or merger; to pay such assessments, subscriptions or other sums of money as the Trustee may deem expedient for the protection of his interest as holder of any stocks, bonds or other securities or of any other property, real or personal; to exercise with respect to any stocks, bonds or other securities any option which a holder thereof may be entitled to exercise; to purchase for the benefit of the trust estate at any foreclosure sale any real estate or personal property upon which the Trustee may have or hold a mortgage, deed of trust, lien or other encumbrance; to cause to be organized or join in causing to be organized a corporation or corporations in any State or States of the United States of America and to transfer to any such corporation any part or parts of the assets of the trust estate either real or personal and receive in lieu thereof shares of stock in such corporation; to cause in his discretion any property of the trust estate to be registered or held of record in his own name or in the name of his nominee or in the name of the corporate Trustee while there be a corporate co-trustee of this trust or the Trustee may retain said property without changing its record or registered owner, and in any such event the Trustee may or may not in his discretion divulge the trust;

to purchase with assets of this trust estate and for this trust estate from the executors, administrators or trustees of any estate, any stocks, bonds, or any other property either real or personal which may be a part of said estate, each said purchase to be for the then fair market value of the property thus acquired; to make as and when authorized by this trust, distribution of principal from the trust or division of principal within the trust in cash and/or other assets of the trust estate as selected, apportioned and evaluated by the Trustee whose action therein shall be conclusive and binding on all parties in interest; to keep any or all of the trust estate in the State of Missouri or in any other State of the United States of America, and to keep the same in his own custody or in custody of or on deposit with any bank or trust company that he may select in the State of Missouri or in any other State of the United States of America to employ the services of any organization engaged in the business of furnishing investment counsel, or the services of any agent or attorney and to delegate to such organization, agent or attorney the right to execute any power, authority or discretion conferred in this Item One on the Trustee or the right to discharge any administrative function incidental to the administration of the trust and to pay for the services of any such organization, agent or attorney out of the principal or income of the trust estate as

determined by the Trustee; and to do any and every such other act and thing and enter into and carry out any and every such agreement with respect to the trust estate or any part thereof as the Trustee would have the right to do if he were the individual owner thereof and as he may deem best in the interests of the beneficiaries of the trust.

In the trusts petitioner set up for his children it was provided that the trust income during the life of each child should be paid the child, or (in the case of the trust for petitioner's son) the child's spouse, or the child's children (R. 91) "in such proportions as the Trustee may determine, it being the intent of [petitioner] that the Trustee in deciding whether or not to disburse any income to or for the benefit of any beneficiary as above provided, * * * shall be guided by the need * * * of such beneficiary for funds in order that he or she may continue to live in a manner which in the opinion of the Trustee befits the standard of living of such beneficiary. The decision of the Trustee as to the apportionment of income as above provided and as to the date or dates respectively for disbursement of income shall be conclusive and binding upon all parties in interest."

In the trust instrument by which petitioner created seven separate trusts for his grandchildren it was provided that the trust income was to

be (R. 91) "paid to [the grandchild] or accumulated as the Trustee may determine, that is to say, the Trustee shall decide as to the disbursement to [the grandchild] of any current or accumulated income of his estate and as to whether any income of his estate shall be accumulated and the decision of the Trustee in such matter shall be conclusive and binding upon all parties in interest."

The trust instruments also provided that the trustee in his absolute discretion could pay out sums from the principal of the trusts to the beneficiaries if they should on account of illness or infirmity be in need of funds in excess of the trust income. (R. 91.)

The trusts were irrevocable. They were to last at least during the respective lives of the beneficiaries, with remainders over either equitable or free from trust, so that no part of the corpus of the respective trusts could revest in petitioner and no part of the income could be held or accumulated for distribution to petitioner. (R. 91.)

Each of the three trusts contained spendthrift provisions which prohibited the beneficiaries from realizing any financial benefit on their trust interests through assignment, pledge, or other transfer. (R. 91.)

When petitioner, the grantor, ceased to be the trustee of the various trusts, a corporation and an individual beneficiary were to become co-trustees of each trust. Annual statements were to be ren-

dered to each adult beneficiary of the income from his or her trust. (R. 92.)

The property transferred by petitioner to himself as trustee under the various trust instruments has been administered by him in the manner provided for under the trust instruments. (R. 92.)

Petitioner was a stockholder and chairman of the board of directors of American Stove Company. (R. 88.) On October 19, 1937, he was the owner or in control of 6,990 shares of the common stock of that company, and on that date transferred 1,500 of these shares to the trust for his son, Arthur Stockstrom, Sr., and Gladys T. Stockstrom and their descendants. On the same date he also transferred shares of stock of other corporations to the other trusts. Before and after transferring the 1,500 shares of stock of American Stove Company to the trust for Arthur Stockstrom, Sr., and Gladys T. Stockstrom and their descendants, petitioner owned or controlled, in addition to such 1,500 shares, a sufficient number of shares in the company to enable him to elect one member of the board of directors, which consists of fifteen members. Petitioner is not an officer or director of any corporation, the stock of which was transferred to these trusts, except the American Stove Company. (R. 92.)

At all times material, petitioner's three adult children were married and were living separate and apart from petitioner and separate and apart

from each other. None of petitioner's grandchildren lived with him, but each grandchild lived with his or her respective parent. (R. 92.)

During the taxable years practically all of the trust income was distributed to petitioner's children who were beneficiaries under the trusts. However, the income of the trust of which his son, or his son's wife, or his son's children were beneficiaries was paid to his son's wife, and the income of the trust of which his daughter, Jessie S. Russell, was beneficiary was not distributed to the beneficiary in 1938. With regard to the income of the seven trusts created for the benefit of petitioner's grandchildren, no income was distributed to five of the beneficiaries in 1938 and 1939; no income was distributed to four in 1940; and no income was distributed to three in 1941. (R. 92–93.)

At all times material petitioner was worth over a million dollars. (R. 93.)

On these facts, the Tax Court affirmed the Commissioner's determination that the power of the petitioner-grantor-trustee over the distribution of trust income, combined with his extraordinarily broad administrative powers over the trust corpus, rendered the income from the trusts taxable to him under the doctrine of *Helvering* v. *Clifford,* 309 U. S. 331. (R. 93–96.) The Circuit Court of Appeals for the Eighth Circuit affirmed. (R. 106–119.)

ARGUMENT

The basic principles which govern the disposition of this case were settled by this Court in *Helvering* v. *Clifford,* 309 U. S. 331. See also *Helvering* v. *Stuart,* 317 U. S. 154; *Hormel* v. *Helvering,* 312 U. S. 552; and *Helvering* v. *Richter,* 312 U. S. 561. Application of the *Clifford* principle to the particular circumstances of this case required the Commissioner and the Tax Court in the first instance, and the court below upon review, to evaluate numerous evidentiary facts bearing upon the extent of the control retained by the grantor over the trust corpus and income, in order to determine whether he remained the owner for all substantial and practical purposes, within the meaning of Section 22 (a) of the Revenue Act of 1938 and of the Internal Revenue Code (*supra,* p. 2). The process of applying the *Clifford* principle to specific factual situations is obviously within the special competence of the Tax Court. *Trust u/w of Bingham* v. *Commissioner,* No. 932, last Term, decided June 4, 1945, not yet reported; *Dobson* v. *Commissioner,* 320 U. S. 489, 501, rehearing denied, 321 U. S. 231; *Helvering* v. *Clifford, supra,* pp. 336, 338; *Harrison* v. *Schaffner,* 312 U. S. 579, 583–584; *Helvering* v. *Stuart, supra,* pp. 167, 169; see also *Hormel* v. *Helvering, supra,* p. 560; and *Helvering* v. *Richter, supra,* p. 562.

We do not share petitioner's views as to the existence of a conflict in the decisions of the cir-

cuit courts of appeals upon this matter. Since *Commissioner* v. *Katz,* 139 F. 2d 107 (C. C. A. 7th), and *Commissioner* v. *Armour,* 125 F. 2d 467 (C. C. A. 7th), were affirmances of the Tax Court's decisions, they represent, at most, instances of differences in emphasis in the Tax Court's rulings in this field. The reversal of the Tax Court's ruling in *Phipps* v. *Commissioner,* 137 F. 2d 141 (C. C. A. 2d), was based upon the assumption that the local courts would have furnished an effective check upon the taxpayer's control. In the present case, however, the decision of the taxpayer as to the disposition of the income was "conclusive and binding upon all parties in interest" (R. 91), and the Circuit Court of Appeals agreed with the Tax Court that the taxpayer had substantial powers over the disposition of income from the trusts (R. 117). The contention that other decisions of the Tax Court[1] are out of harmony with the decision here was sufficiently answered by the Circuit Court of Appeals. (R. 117-118.)

Neither does the decision below conflict with the recent decision of the Tenth Circuit in *Hall* v. *Commissioner,* decided July 2, 1945 (1945 C. C. H., par. 9367). The conclusion in the *Hall* case that the grantor was not taxable on the trust

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[1] The cases cited are *Ayer* v. *Commissioner*, 45 B. T. A. 146; *Lowenstein* v. *Commissioner*, 3 T. C. 1133; *Small* v. *Commissioner*, 3 T. C. 1142; *Cherry* v. *Commissioner*, 3 T. C. 1171; and *Banfield* v. *Commissioner*, 4 T. C. 29.

income resulted from the fact that the reviewing court found no power in the grantor to shift beneficial interests, since any accumulated income was ultimately payable to the primary beneficiary 15 years after the creation of the trust. Here, on the other hand, the grantor could exercise his power over the distribution of income in such a manner as to foreclose completely the receipt of current or accumulated income by the primary beneficiaries. This distinction is an important one (see *Foerderer* v. *Commissioner,* 141 F. 2d 53 (C. C. A. 3d)) for, as this Court has stated, the power to dispose of income is equivalent to ownership of it and the exercise of that power to procure payment to another is the enjoyment and realization of the income by him who exercises it. *Helvering* v. *Horst,* 311 U. S. 112, 118; see also *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Harrison* v. *Schaffner, supra,* p. 581.

The opinion below makes it abundantly clear that this case turns on its own particular circumstances. The opinion is devoted almost entirely to a statement and discussion of the facts. The court below stated its conclusion in these words (R. 116)—

> * * * we are not able to say as a matter of law that the Tax Court has erred in appraising petitioner's control of the trust property and of its income as being so substantial in their existing combination as to be fairly equivalent, in direct and indirect

> satisfactions to him in the family relationship, to what he previously had and what the property had meant to him, and hence to a retention of its economic ownership for purposes of section 22 (a). See *Dobson* v. *Commissioner,* 320 U. S. 489, 501 * * *; *Tyson* v. *Commissioner,* 8 Cir., 146 F. 2d 50, 51; *George* v. *Commissioner,* 8 Cir., 143 F. 2d 837, 841 [certiorari denied, 323 U. S. 778].

Petitioner's assertion (Br. 12–14) that the decision below cannot be reconciled with *Eisner* v. *Macomber,* 252 U. S. 189; *Hoeper* v. *Tax Commission,* 284 U. S. 206; and *Heiner* v. *Donnan,* 285 U. S. 312, cannot be supported. Here, as in the *Clifford* case, the tax is levied upon income which in substance and reality is that of this taxpayer and not of another. The fact that there was an otherwise valid anticipatory assignment of income is no more material here than it was in the *Clifford* case.[2]

Implicit in the petition (particularly p. 4, Br. 10–12, 15–18) is an attempt to limit the doctrine of *Helvering* v. *Clifford* to the particular facts of that case, and to emphasize the difficulties incident to the application of the *Clifford* doctrine to diverse factual situations. But this is to ignore

---

[2] See also *Commissioner* v. *Harmon*, 323 U. S. 44; *Helvering* v. *Eubank*, 311 U. S. 122; *Helvering* v. *Horst*, 311 U. S. 112; *Higgins* v. *Smith*, 308 U. S. 473; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376; and *Lucas* v. *Earl*, 281 U. S. 111.

the nature of the ruling in that case. The *Clifford* case established the general concept of substantial ownership in determining the tax liability of a grantor for trust income, but did not attempt to promulgate a detailed code for deciding particular cases having varying sets of facts. As the Court itself has recognized, not only in its opinion in the *Clifford* case (309 U. S. at 334) but also in later cases (*Harrison* v. *Schaffner,* 312 U. S. 579, 583; *Helvering* v. *Stuart,* 317 U. S. 154, 167), the task of translating the *Clifford* doctrine into a specific criterion of tax liability in particular cases is primarily a matter for the Commissioner and the Tax Court.

CONCLUSION

The decision below was correct, and no conflict in decisions is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 96.

LOUIS STOCKSTROM,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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Cases Cited.

Statute Cited.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

In the first sentence, under the heading "Argument", on page 11 of respondent's brief we find this statement:

> "The basic principles which govern the disposition of this case were settled by this Court in Helvering v. Clifford, 309 U. S. 331."

We believe that this statement is erroneous. We further believe that this fundamental error is the cause of

the conflict in many of the hundreds of cases which have been decided in the Tax Court and the various courts of appeal.

In the opinion in the Clifford case this Court said:

> "In absence of more precise standards or guides supplied by statute or appropriate regulations, the answer to that question must depend on an analysis of the terms of the trust and of the circumstances attendant on its creation and operation."

In footnote 1, which appears at the bottom of page 334 of the Clifford opinion, we find this statement:

> "We have not considered here Article 166-1 of Treasury Regulations 86 promulgated under Section 166 of the 1934 Act and in 1936 amended (T. D. 4629) so as to rest on Sec. 22 (a) also, since the tax in question arose prior to that amendment."

The principles which govern the disposition of this case were, therefore, not settled by this Court in the Clifford case, because the taxable years involved in this case are 1938, '39, '40 and '41.

In its opinion in the Clifford case this Court was careful to point out in the footnote that for taxable years beginning after 1936 the law would be found in Section 22 (a) and the Commissioner's Regulations promulgated thereunder.

In the Tax Court this point was passed by without notice.

The Circuit Court of Appeals refused to discuss it.

It is now ignored in respondent's brief.

We say that the law of this case is now governed by Sec. 22 (a) and the Commissioner's Regulations which were promulgated thereunder.

We further say that the principles announced in the Clifford case were limited by this Court to taxable years beginning prior to 1936.

The Regulations which were promulgated under Sec. 22 (a) are set forth in the appendix to the petition in this case, on pages 19-23. These Regulations, as pointed out by this Court, were not adopted until the year 1936 and hence had no application to the Clifford case, because the tax in that case was for the year 1934.

These Regulations clearly show that it was not the intention of the Commissioner that the petitioner in this case should be liable for a tax on the trust income, for the following reasons:

> (a) The trusts are long-term trusts—the regulations cover only short-term trusts.
>
> (b) Grantor stripped himself of the substantial incidents of ownership in the corpus.
>
> (c) The grantor, incident to a definitive and permanent disposition of certain of his property, created the trusts in order to conserve the property, not for himself but for the donees.

The Commissioner's Regulations are rather lengthy but when read as a whole it is quite apparent that they do not cover long-term trusts. On page 22 of our petition there appears the following statement from the Commissioner's Regulations:

> "On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property not for himself, but for the donees who will ultimately enjoy it, the provisions of Sections 161, 162 and 163 are applicable."

The Regulation then continues and cites examples (A), (B) and (C). These examples clearly show that it was the intent of the Commissioner, when writing these Regulations, that the income from trusts of the character now under consideration should not be taxed under Sec. 22 (a).

We have not been able to get the Tax Court or the Court of Appeals to give any consideration to these Regulations, and respondent's brief now before the Court utterly ignores the regulations.

In the last sentence on page 15 of respondent's brief there appears this statement:

> "The task of translating the Clifford doctrine into a specific criterion of tax liability in particular cases is primarily a matter for the Commissioner and the Tax Court."

In answer to this statement we say that the Clifford doctrine is applicable only to those cases wherein the tax liability arose prior to the date that the Commissioner adopted his Regulations under Sec. 22 (a). After these Regulations were adopted the law of the case is governed by Sec. 22 (a) and the Regulations promulgated thereunder.

It is the failure to recognize this important fact that has led the courts to announce so many conflicting decisions.

In the very case at bar it was Judge Johnson, the writer of the majority opinion, who said:

> "It is to be wished, of course, that the field opened up by the Clifford case may come to have some definite monuments."

This statement overlooks the fact that this Court established a monument and limited the Clifford doctrine to cases which arose prior to the adoption of the Commissioner's Regulations in 1936.

Judge Sanborn, who wrote the concurring opinion, said:

> "I think the Tax Court might well have decided this case in favor of the taxpayer, but the standard of determining to whom the income is taxable is presently so vague and indefinite that I have no conviction

as to whether the decision of the Tax Court is, as a matter of law, right or wrong. I, therefore, concur. I think it is unfortunate that courts which are required to determine such controveries as this must express opinions which are obviously little more than guesses."

None of the opinions in any of the courts would be "guesses" if the courts followed the direction of this Court in the Clifford case, in footnote 1, page 334. In that footnote this Court said in substance that after the taxable year 1936 the law would be found in Sec. 22 (a) and the Regulations promulgated thereunder.

It ought to be an easy matter and not a "guess" to say whether or not the income from any trust is taxable to the grantor if the law were construed in accordance with the regulations. The difficulty in all of the cases is that the Commissioner, the Tax Court and the various courts of appeal have utterly ignored the Commissioner's Regulations.

On page 11 of respondent's brief we find this statement:

> "We do not share petitioner's views as to the existence of a conflict in the decisions of the Circuit Courts of Appeals upon this matter. Since Com. v. Katz, 139 Fed. (2d) 107, and Com. v. Armour, 125 Fed. (2d) 467, were affirmances of the Tax Court's decisions, they represent, at most, instances of differences in emphasis in the Tax Court's rulings in this field."

As we read this statement it amounts to an admission that there is a conflict in the decisions, but the conflict is due to "differences in emphasis in the Tax Court's decisions."

To illustrate, in the Armour case both the Tax Court and the Circuit Court of Appeals for the Seventh Circuit emphasized strongly the fact that the Clifford doctrine

did not apply to long-term trusts. In the case at bar the Tax Court and the Circuit Court of Appeals emphasized strongly the fact that the Clifford doctrine does apply to long-term trusts.

In the Armour case both the Tax Court and the Court of Appeals for the Seventh Circuit emphasized strongly the fact that adult children living separate and apart from the grantor were not members of his family group.

In the case at bar the Tax Court and the Circuit Court of Appeals emphasized strongly the fact that adult children living separate and apart from grantor are members of his family group.

These rulings, as pointed out by counsel for respondent, are not conflicting but are merely "differences in emphasis."

We belong to the old school and prefer to call them "head-on conflicts."

On page 14 of respondent's brief we find this statement:

> "Here, as in the Clifford case, the tax is levied upon income which in substance and reality is that of this taxpayer and not of another."

This statement overlooks two important facts:

1. In the Clifford case the property was to revert to the taxpayer in the short space of five years, while in the case at bar there is no reversion.

2. The income could not be that of this taxpayer in view of the specific finding of the Court of Appeals in this case that—

> "All ten of the trusts were irrevocable and petitioner was not to receive corpus or income from any of them. * * * The trusts were intended for petitioner's family and he was not to share in the income or get back any of the corpus."

As pointed out in our brief accompanying the petition, on page 13 thereof, the trust corpus and income were fully, finally and definitely disposed of. The money to pay the tax would have to come from petitioner's private property. This, in effect, would be the levying of a tax on capital and would have nothing whatever to do with income.

Under Point II, on page 10 of our brief accompanying the petition, we stated that the decision in this case is in conflict with the decision of this Court in the case of Helvering v. Stuart, 317 U. S. 154. Respondent in his brief does not deny this statement. It, therefore, stands admitted on this record that the decision of the Court of Appeals in this case is in conflict with the decision of this Court in the Stuart case.

In the Stuart case this Court said:

> "Economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme."

No one has ever been able to point out where or how, in this case, the petitioner could realize economic gain from the trust assets.

We desire to state that in the Tax Court we relied on the Stuart case but that court passed it by without comment.

When the case reached the Circuit Court of Appeals we called that court's attention to the Stuart case, but it, like the Tax Court, passed it by without comment.

There must be something in the Stuart case which the respondent, the Tax Court and the Court of Appeals for the Eighth Circuit cannot explain. All of them have adopted the easy way out and have refused to give any notice whatever to the Stuart case.

It is important to note that the Stuart case, like the Clifford case, involved taxable years prior to 1936 and

prior to the promulgation of the Commissioner's Regulations under Sec. 22 (a).

The major portion of the argument contained in respondent's brief is addressed to the proposition that the decision of the Tax Court in this case should be final and not subject to review by the appellate court. As an example, we quote from page 11 of the brief the following:

> "The process of applying the Clifford principle to specific factual situations is obviously within the special competence of the Tax Court."

This argument overlooks the fact that we are here attempting to construe a statute [Sec. 22 (a)] and the Regulations of the Commissioner promulgated thereunder. This is always a pure question of law and reviewable by the appellate courts.

In the late case of Trust u/w of Bingham v. Com., #932, last term, decided June 4, 1945, not yet reported, this Court said:

> "But whether the applicable statutes and regulations are such as to preclude the decision which the Tax Court has rendered, is, as was recognized in Dobson v. Com., a question of law reviewable on appeal."

It is the contention of petitioner that the applicable statute [Sec. 22 (a)] and the Commissioner's Regulations are such as to preclude the decision which the Tax Court has rendered.

This point was argued in the Circuit Court of Appeals but that Court based its decision squarely on the case of Dobson v. Com., 320 U. S. 489. It is, therefore, plain that petitioner has never had a hearing on the vital question of whether or not he is taxable on the income from the trusts under Sec. 22 (a) and the Commissioner's Regulations promulgated thereunder.

It is, therefore, of the utmost importance that the writ of certiorari be granted in this case in order that this Court may have an opportunity for the first time to review the many conflicting decisions on this troublesome question in the light of Sec. 22 (a) and the Regulations promulgated thereunder.

If this Court sees fit to grant the writ of certiorari it will afford the first opportunity to petitioner to have judicially determined the question of whether or not the

> "applicable statute and Regulations are such as to preclude the decision which the Tax Court has rendered."
>
> Trust u/w of Bingham v. Com., supra.

The decision in this case is out of line with the majority of the decisions on the taxation of trust income. In fact it is so far out of line that we are reliably informed the Commissioner is now engaged in rewriting his Regulations under Sec. 22 (a). In view of this fact it might not be inappropriate to request the Court to withhold any action on this application until the Commissioner has promulgated his new Regulations under Sec. 22 (a).

Respectfully submitted,

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